

STATE BAR ASSOCIATION OF NORTH DAKOTA
ETHICS COMMITTEE

OPINION NO. 06-05

June 21, 2006

Introduction

The SBAND Ethics Committee received a request for an opinion asking if the North Dakota Rules of Professional Conduct prohibit an attorney from representing criminal defendants in city court when a partner of the requesting attorney is on the city's council.

Assumed Facts

The requesting attorney practices primarily criminal defense law. A partner in the requesting attorney's firm is on the city council in the city where the requesting attorney represents criminal defendants. The partner/attorney on the city council does not act as the attorney for the city. The requesting attorney has no affiliation with the city council other than being a law partner with one of the council members. The requesting attorney, at this time, does not take cases representing defendants in city court matters.

The Committee is asked to answer the following questions:

1. May the requesting attorney act as defense counsel in city court cases when another attorney in the firm is a city councilperson?
2. If the above situation results in a conflict of interest, may that conflict be waived?

DISCUSSION

In Ethics Committee Opinion No. 05-06, this Committee addressed, among other things, whether an attorney who is a member of a city council may represent criminal defendants in city cases transferred to North Dakota State District Court when the matter is prosecuted by the

State's Attorney. This Committee determined that, under the Rules of Professional Conduct, including N.D.R. Prof. Conduct 1.7, the attorney had an impermissible conflict of interest in representing criminal defendants in city cases transferred to District Court.

The issue presented is similar yet slightly distinguishable from that addressed in Opinion 05-06. For example, the requesting attorney is not on the city's council. Rather, it is another attorney in the requesting attorney's firm that is on the city's council. Also, unlike in Opinion 05-06, the requesting attorney has inquired whether the attorney can represent criminal defendants in city court, not State District Court.

Whether an impermissible conflict of interest exists in the issue presented depends, in large part, on whether the analysis and conclusions in Opinion 05-06 are extended to all attorneys in a firm who practice with an attorney who sits on a city's council. The answer to that question depends on application of the "imputed disqualification rule" under N.D.R. Prof. Conduct 1.10.

A. Rule 1.10 Requires That Opinion 05-06 Apply To All Members Of the Firm, i.e., Under the Assumed Facts a "Chinese Wall" cannot be Constructed to Preclude the Conflict of Interest.

On August 1, 2006, material changes to N.D.R. Prof. Conduct 1.10(a) will take effect. Therefore, the Committee will first discuss the current version of Rule 1.10 and then will discuss the changes to the Rule that will apply to the requesting attorney's request beginning August 1, 2006.

1. Pre-August 1, 2006 Version of Rule 1.10.

The relevant provisions of Rule 1.10, until August 1, 2006, are as follows:

- (a) Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, except as provided by Rule 1.11 or Rule 1.12.

- ...
- (b) A disqualification prescribed by this rule may be waived by the affected client's consent after consultation.

The official comment to Rule 1.10 provides that:

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Thus, in analyzing Rule 1.10(a), one must treat all lawyers in a law firm as one lawyer.

In SBAND Ethic's Opinion No. 01-04, this Committee concluded that one attorney in a law firm may not be insulated from a case so as to avoid a conflict of interest merely by erecting a "Chinese Wall" within the firm. A "Chinese Wall" is a procedure aimed to isolate a disqualified lawyer from working on a matter so as to allow other attorneys in the firm to carry on the questioned representation free of any taint of misuse of confidences. See The Chinese Wall Defense To Law-Firm Disqualification, 128 U. Pa. L. Rev. 677 (1980). Typical walling procedures include prohibiting the tainted attorney(s) from having any connection with the case or receiving any share of the fees attributable to it, banning relevant discussions with or the transfer of relevant documents to or from the tainted attorney(s), restricting access to files, educating all members of the firm as to the importance of the wall, and separating, both organizationally and physically, groups of attorneys working on conflicting matters. Id. Opinion 01-04 concluded that an attempt to erect such a "Wall" around the attorney did not cure the conflict such that other attorneys in the firm could be involved in the case. That conclusion was based, in large part, on the North Dakota Supreme Court's decision in Heringer v. Haskel, 536 N.W.2d 362 (N.D. 1995).

In Heringer, the North Dakota Supreme Court explained that “[t]he determination whether a firm is disqualified under Rule 1.10(c) is dependent upon the particular facts of the case, and the firm whose disqualification is sought bears the burden of proof Any doubt must be resolved in favor of disqualification.” Id. at 365 (citations omitted). The Supreme Court concluded that a law partner’s access to confidential information justifies disqualification of the partner because the partner is imputed with all knowledge in the firm’s files and such access to confidential information is imputed to other attorneys in the firm. Id. at 366 (citations omitted). “[S]uch access equates with knowledge of the client’s confidential information.” Id.

The Heringer Court noted that North Dakota generally does not have large law firms with dozens of attorneys working in different buildings or cities under circumstances where it may be common for attorneys to not discuss cases or have general access to all of the firm’s files. Id.

This case, however, involves a three-person law firm which admittedly had no policy or other safeguards to restrict access to files and information among the attorneys. Furthermore, as is what we believe to be the common experience in North Dakota law firms, it is not uncommon for these attorneys to discuss their cases with each other. Under these circumstances, it is reasonable and justified to infer that each attorney had access to, and therefore knowledge of, all confidential information of the firm’s clients.

Id.

There is no information presented to the Committee that the requesting attorney practices law in one building or location separate from the building/location where the firm attorney who sits on the city council practices. There also is no information presented that the computer system and/or files are separated such that the requesting attorney and the attorney on the city council do not have access to each other’s files. Thus, the requesting attorney and the attorney who sits on the city council are imputed with all knowledge in the firm’s files which contain confidential information relating to the city and/or all files in which the firm is representing criminal

defendants in city court. Under the current version of Rule 1.10, no “Chinese Wall” or screening can be implemented to prevent an imputation of information in the firm’s files. This Committee’s conclusions in Opinion 05-06 apply to the requesting attorney under the current, pre-August 1, 2006, version of Rule 1.10.

3. The Requesting Attorney Has A Conflict Of Interest In Representing Criminal Defendants In City Court.

Whether an attorney’s interests present a conflict of interest is governed, generally, by Rule 1.7, N.D.R. Prof. Conduct. Because the current, pre-August 1, 2006, version of Rule 1.10 requires that all lawyers be treated as one in determining conflicts of interest, in applying Rule 1.7 one must assume that the interests of all lawyers in the requesting attorney’s firm are imputed to the requesting attorney, including the interests of the attorney on the city council.

Rule 1.7(a) provides that a lawyer cannot represent a client if the lawyer’s ability to represent the client will be adversely affected by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests. Rule 1.7(b) provides that a lawyer shall not represent a client when the lawyer’s own interests are likely to adversely affect the representation. The conflicts under 1.7(a) and 1.7(b) cannot be waived, even if the clients consent. Rule 1.7(c) provides that a lawyer cannot represent a client if that representation might be adversely affected by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless the lawyer reasonably believes the representation will not be adversely affected and the client consents after consultation. Whether a certain conflict situation falls within paragraph (c) versus paragraphs (a) or (b) of Rule 1.7 is generally a fact question that often can only be decided by the attorney involved. Even so, this Committee’s opinion numbered 05-06 provides helpful guidance.

Opinion No. 05-06 concluded that an attorney who sits on a city Council is prohibited from acting as defense counsel on city cases transferred to District Court. Opinion 05-06 explains that:

The potential for conflict comes from the requesting attorney's obligations to the City as a council member and a member of the council's Police Commission. In addition, the attorney's own interest in being re-elected could arguable be a personal interest which might have an affect on the attorney's representation of a defendant in a City Case. Further, there is the potential for a client or even a victim of a criminal act to believe that the attorney, as a council member or member of the Police Commission, can impliedly influence an officer's testimony. Lastly, consideration must be given to the impact upon the administration of justice related to the attorney acting as defense counsel and being required to aggressively cross-examine city police officers in relation to the attorney's elected position on the city council with responsibility for overseeing the Police Department budget and grievances.

Some of the concerns quoted above do not apply in the issue presented because the requesting attorney is not on the city commission and, therefore, is not seeking re-election. There is no information presented that the law partner on the city council is a member of the Police Commission. Even so, as explained in Opinion 05-06, consideration must be given to the administration of justice. There is the potential for a client or even a victim of a criminal act to believe that the requesting attorney, as a law partner with a member on the city council, will have an unfair advantage in representing a criminal defendant in city court. The fact a partner of the requesting attorney is on the city council may lead others, such as a client or victim of a crime, to question whether the requesting attorney can aggressively cross-examine city officials and officers and/or whether the requesting attorney may have some unfair advantage in representing criminal defendants in city cases.

In Opinion 05-06, this Committee determined that an impermissible conflict of interest exists when an attorney who is on a city's council represents criminal defendants in city court.

This Committee explained that:

The city council is responsible for adopting ordinances and seeing that they are enforced. In addition, the city cases have a financial impact upon the city, regarding both income and expense of prosecution. The duties and loyalty required of an elected official will adversely affect the attorney's duties as defense counsel on city cases and is not a waiveable conflict. See NY Eth. Op. 692, 1997 WL 10068495; CA Eth. Op. 1977-46, 1977 WL 15964.

Therefore, because the current, pre-August 1, 2006, version of Rule 1.10 imputes the knowledge and interests of the attorney on the city commission to the requesting attorney, an impermissible, non-waiveable conflict of interest exists under Rule 1.7. The requesting attorney cannot represent criminal defendants in city court as long as his partner is on the city council.

4. The Changes To Rule 1.10 Effective August 1, 2006 Do Not Change The Conclusion That The Requesting Attorney Has An Impermissible Conflict of Interest.

Beginning on August 1, 2006, the relevant language of Rule 1.10(a) is changed to read as follows (with the changes noted in underline font):

(a) Lawyers associated in a firm may not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by these rules, except as provided by Rule 1.11, Rule 1.12, 1.18 or 6.5, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. For purposes of this paragraph, a personal interest disqualification is one created by a lawyer's interests other than those arising from the representation of other clients or the owing of fiduciary duties to some third party.

The changes to Rule 1.10(a) provide an exception to a finding of a conflict of interest in situations in which the conflict arises out of an attorney's personal interest. Under new rule 1.10(a), the partner's sitting on the city council will not cause an impermissible conflict of interest if it does not present a significant risk of materially limiting the representation of

criminal defendants in city court by the requesting attorney. The comment to New rule 1.10 provides as follows:

Personal Interest

A conflict of interest based upon a lawyer's personal interest will not impute to the lawyer's law firm provided the personal interest falls within the definition included in this rule and to the extent usual concerns justifying imputation are not present. This exception applies only where the prohibited lawyer does not personally represent the client in the matter and no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the work of others in the firm.

The initial question is whether the partner's sitting on the city commission is a "personal interest" that falls within the "exception" in new Rule 1.10(a).

The type of a "personal interest" held by another member of the firm that does not result in an impermissible conflict of interest is a personal interest not created by the other lawyer's representing another client or the other lawyer's owing a fiduciary duty to a third party. In the issue presented, the partner sitting on the city council owes a fiduciary duty to that entity. As explained in Opinion 05-06, elected officials owe duties and loyalty to the government body the elected officials serve. (See generally NY Eth. Op. 692, 1997 WL 10068495; CA Eth. Op. 1977-46, 1977 WL 15964). Thus, the "personal interest" of the partner is not one that falls within the exception of new Rule 1.10. Accordingly, the change in language to new Rule 1.10(a) does not prevent imputing to the requesting attorney the conflict caused by the partner sitting on the city council.

Even assuming, however, that the partner's serving on the city council is a "personal interest" that falls within the exception to new Rule 1.10, the next question is whether that personal interest presents a significant risk of materially limiting the requesting attorney's representation of clients in city court. The comment to new Rule 1.10 provides that in

determining if a personal interest of another member in the firm presents an impermissible conflict one must look to see if “no other circumstances suggest the conflict of the prohibited lawyer is likely to influence the work of others in the firm.” As explained above, there are a number of circumstances that suggest that the partner’s serving on the city council is likely to influence the requesting attorney’s representing criminal clients in city court, including the potential for a client or even a victim of a criminal act to believe that: the requesting attorney will have an unfair advantage; will have a conflict in aggressively cross-examining city officials and city police officers; and/or, may have some unfair advantage in representing criminal defendants in city court. The city council is responsible for adopting ordinances and seeing that they are enforced and has a financial interest in criminal cases tried in city court, regarding both income and expense of prosecution. Thus, the partner’s sitting on the city council provides a significant risk of materially limiting the requesting attorney’s representation of clients in city court. Therefore, new Rule 1.10(a) does not prevent the conflict of interest caused by the partner’s sitting on the city council from being imputed to the requesting attorney.

The final question is whether the conflict of interest can be waived. New Rule 1.10(d), like the current rule, allows disqualification to be waived by the affected client’s consent. However, Rule 1.7, the general conflict of interest rule, must also be considered. As explained in Opinion 05-06, an attorney sitting on a city council has an impermissible non-waiveable conflict of interest under Rule 1.7 in representing criminal defendants in city court. Because new Rule 1.10(a) imputes that conflict to other members in the firm, Opinion 05-06 shows that the requesting attorney cannot avoid the conflict in representing criminal defendants in city court by obtaining consent. Therefore, as long as the requesting attorney’s partner is on the city council, new Rule 1.10 also does not allow the attorney to represent criminal clients in city court.

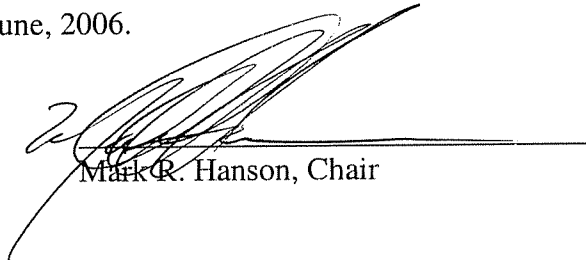
CONCLUSION

Under either the current version of N.D.R. Prof. Conduct 1.10(a), or the new version that will be in effect on August 1, 2006, the conflict of interest arising from the requesting attorney's partner sitting on the city council is imputed to the requesting attorney so that the requesting attorney cannot, as long as the partner is on the city council, represent criminal defendants in city court. The conflict of interest is not "waiveable" upon obtaining consent from the effected clients.

This opinion is provided pursuant to rule 1.2(b), North Dakota Rules for Lawyer Discipline, which provides:

A lawyer who acts in good faith and reasonable reliance on a written opinion or advisory letter of the Ethics Committee of the Association is not subject to sanction for violation of the N.D.R.Prof. Conduct as to the conduct that is the subject of the opinion or advisory letter.

This opinion was prepared by Mark Hanson and approved by a unanimous vote of the Ethics Committee on the 21st day of June, 2006.



Mark R. Hanson, Chair